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Supreme Court of the United States

October Term, 1963

No. 431

PAUL GORDON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes Paul Gordon, by his attorney, Jacob W. Friedman, and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the Southern District of New York, which Court imposed a prison sentence on petitioner.

Opinions Below

The opinion of the Court of Appeals is set forth in the Appendix, *infra*. There was no opinion by the District Judge.

Jurisdiction

The judgment of the Court of Appeals was entered on July 5, 1963. An informal application for rehearing, made by petitioner in person, was denied by that Court on August 12, 1963. On August 6, 1963, Mr. Justice Brennan extended petitioner's time to file petition for certiorari to and including September 3, 1963. The jurisdiction of this Court is invoked under 18 U. S. C. 2(a); 18 U. S. C. 371; 21 U. S. C. 173; 21 U. S. C. 174; 26 U. S. C. 2553(a); 26 U. S. C. 2554(a); and Rule 17e Fed. Rules Crim. Proc.

Statutes Involved

15 United States Code, Section 77 g(a) provides:

> "It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly——
>
> "(1) to employ any device, scheme or artifice to defraud, or
>
> "(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the cir-

cumstances under which they were made, not misleading, or

"(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

15 United States Code, Section 77x, provides the penalties for violation of any of the provisions of the subchapter.

Questions Presented

(1) Whether the Government proved a *prima facie* case of fraud or misrepresentation on the part of petitioner, and whether the Court did not err in submitting the case to the jury.

(2) Whether the Court erred in receiving subject to connection the testimony of the witness King as to an alleged telephone conversation with petitioner when the evidence later adduced did not suffice to establish such connection.

(3) Whether the Court erred in permitting an opinion characterizing petitioner's place of employment as a boiler room.

(4) Whether the Court erred in receiving, over objection, opinion testimony that salesmen probably used assumed names.

(5) Whether the Court erred in receiving the admittedly incompetent but prejudicial testimony of the witness Gentzel, and in denying a motion to strike it.

(6) Whether the Court erred in unnecessarily reproving, deriding and ridiculing petitioner's trial counsel

Statement

Petitioner herein appealed in the first instance (a co-defendant, Harold Ross, simultaneously filed a separate appeal) from a judgment of the United States District Court for the Southern District of New York, rendered on December 5, 1962, after trial before Dawson, D. J., and a jury. The single count on which he was convicted, under the statute quoted above, charged fraudulent interstate sale of securities. He is at liberty on bail during the pendency of appellate proceedings.

At the close of the Government's case, the Court dismissed the conspiracy count and two substantive counts. The first count (dismissed as to petitioner) charges that all twenty defendants knowingly offered for sale in interstate commerce certain securities, including the stock of Mark, Inc., and in so doing practiced fraud upon the purchasers. The fraud alleged with regard to Mark, Inc., consisted of causing the publication of fictitious market price quotations, establishing fictitious brokerage accounts, causing a merger of Great Western Enterprises, Inc., with Mark, Inc., changing the name of the latter to Perry Oil Company, causing Perry Oil Company to declare a stock dividend, distributing misleading bulletins, misrepresenting the prospects of Perry Oil Company and knowingly concealing the fact that Mark, Inc., and Perry Oil Company had no income, profits or earnings.

Count Three (on which petitioner was convicted) charges that on July 29, 1958, appellant and some twelve other defendants, in furtherance of the alleged scheme to defraud, mailed a confirmation of the purchase of Mark, Inc., common stock addressed to Hazel, Mae and Sam King, at Conway, Ark.

The Government's bill of particulars, so far as pertinent, alleged:

> "1-2) The defendant caused an employee or employees of Kimball Securities, Inc. to mail the confirmation for the telephone order obtained by him.
>
> "3-4) The confirmation was sent to confirm the sale of Mark, Inc. stock to one of the persons to be defrauded and to obtain payment for the stock, in furtherance of the scheme and artifice to defraud referred to in pages 1 through 10 of the indictment.
>
> "5) Hazel Mae and Sam King, Jr. actually received the confirmation."

The best that can be said for the Government's position is that the proof against petitioner was certainly not of a clear or conclusive character. The least weight that is ascribable to this aspect of the case is that if entitled him to a trial free from error, so that incorrect rulings which otherwise might be disregarded must be given greater force in their possible bearing upon the outcome.

The cumulative effect of as few as two errors may necessitate the reversal of a conviction. *See Gordon v. United States*, 344 U. S. 414, 97 L. Ed. 447. Especially where the case is "a close one" and not "open and shut," an error otherwise harmless will be deemed prejudicial. *Bihn v. United States* 328 U. S. 633, 90 L. Ed. 1485.

While petitioner appreciates that this is not the forum in which to press questions of fact, it is urged on his behalf that he has consistently maintained his complete innocence, a circumstance which certainly should not detract from the validity of his arguments in any appellate tribunal.

Reasons for Granting Writ

The opinion of the Court of Appeals presents several questions of law, and it is at least arguable whether the determination does not conflict with other appellate opinions on like questions. It is also believed that the view taken by the Court of Appeals is contrary to the proceedings disclosed by the record. A number of the rulings involved constitute prejudicial error. Undersigned counsel is aware of the requirements of this Court's rules that the questions presented for review be expressed without unnecessary detail, and an attempt will be made to present these matters as concisely as is consistent with the necessities of the case.

ARGUMENT

QUESTION NO. 1

Whether the Government proved a *prima facie* case of fraud or misrepresentation on the part of petitioner, and whether the Court did not err in submitting the case to the jury.

We now proceed to a consideration of the evidence, especially in its relation to petitioner.

The only corporate defendant was Kimball Securities, Inc. Petitioner's entire connection with everything charged in the indictment arises from the undisputed fact that he was employed by that corporation for a period of seven working days, commencing July 21, 1958 (R. 39-41).

Joseph C. Kimball, the Government's principal witness, was the executive officer of the corporation, was also a defendant and pleaded guilty (R. 45-46). He testified

that he did not remember petitioner at all (R. 47-48); that he would not recognize him if he met him, adding (R. 153-154):

> "I know he worked a short time, and whether he made any sales or not I don't know."

He stated further that salesmen were given no training but merely supplied with literature (R. 64-65). Nor were they given balance sheets, income reports or profit and loss statements of Mark, Inc., or Perry Oil Company. Kimball Securities neither had a research department nor employed any analysts. The Mark, Inc., statement pamphlet furnished by the company to its salesmen in the spring of 1958 was believed by the witness to be substantially correct (R. 87-88). Mark, Inc., was being dealt in by other reputable firms (R. 108-109). So far as the valuation of the oil properties was concerned, the witness relied upon the report of one Luckett, who "was recognized as an authority, as a fine geologist" (R. 112-113). The witness had no reason to suspect that the figures given by Mark, Inc., to his firm at any time in 1958 were incorrect (R. 134). In his opinion, Mark, Inc., was a legitimate stock (R. 167), and the witness never intended to defraud anybody (R. 176)—specifically in July, 1958 (R. 177), when he was acting in complete good faith.

Finally, this executive officer of defendant corporation (petitioner's employer) was constrained to admit that the salesmen were certainly not in a better position to ascertain the facts (R. 183).

On the testimony of this Government witness alone, it is submitted that no case of fraud was shown against petitioner. The Government offered Kimball as being worthy of belief. If, as he consistently indicated, during the brief period of petitioner's employment the company,

to the best of Kimball's knowledge and belief, was engaged in a perfectly honest venture in selling Mark, Inc., stock, it is utterly unreasonable to suppose that petitioner was guilty of any fraud in the one sale charged to him.

The conviction virtually rests on the testimony of Sam King, Jr. (R. 239-274). He was the man in Arkansas to whom it was claimed by the Government petitioner sold 300 shares of Mark, Inc., by telephone in July, 1958. Wholly apart from the fact that neither foundation nor subsequent connection was established to entitle the Government to introduce proof of the two alleged telephone conversations (discussed below), we submit that nothing said by this witness rose to the level of adequate proof of fraud. Apart from generalities, the prosecution was determined to show that petitioner had stated that the stock was on the New York Stock Exchange. This was improperly elicited by a leading question (R. 243). On cross-examination, however, the witness said he did not know too much about stock or exchanges; and that he thought the man he was speaking to told him it was "over the counter" (R. 264-265); also that the man described the stock as a speculation, a term which the witness understood to mean "that you are taking a chance on a company, hoping for the good" (R. 265-266). Despite the efforts of the United States Attorney to get the witness back into a reference to the New York Stock Exchange, King insisted that he remembered the reference to over the counter, and twice again declared he was "sure" the man mentioned over the counter in relation to this stock (R. 272-273). Despite the foregoing, the Government in summation laid great stress on the alleged representations as to listing on the New York Stock Exchange—this time imputing to petitioner a statement that "the stock is going to be listed on the New York Stock Exchange" (R. 703-704).

We submit that, inasmuch as petitioner was convicted solely on the count relating to the King transaction, the evidence is entirely too flimsy, inconsequential and contradictory to sustain the verdict. "Mere suspicion is not a sufficient ground on which to convict a man of any criminal offense." *Turinetti* v. *United States* (C. C. A. 8, 1924), 2 F. 2d 15.

With full recognition of the limitations on the appellate jurisdiction respecting mere weight of evidence, it is still the law, as stated in *Edwards* v. *United States* (C. C. A. 8, 1925):

> "If the evidence, taken as a whole is as consistent with innocence as with guilt, then the conviction should not be sustained * * * The legal presumption was that he was innocent of that crime until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence that is as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction."

In accordance with this rule it was recently held, in a prosecution under the same statute, that where there was no substantial proof of misrepresentation to a specific investor, a conviction on a count involving that investor would have to be reversed. *See United States* v. *Schaefer* (C. A. 7, 1962), 299 F. 2d 625.

QUESTION NO. 2

Whether the Court erred in receiving subject to connection the testimony of the witness King as to an alleged telephone conversation with petitioner when the evidence later adduced did not suffice to establish such connection.

When Kings' testimony as to a telephone conversation with a man who said his name was Paul Gordon was first offered, petitioner requested a *voir dire* examination. The witness admitted he never met or spoke to petitioner. The testimony was taken subject to connection (R. 240-242).

The only evidence adduced by the Government by way of supposed connection was the testimony of one Gillen, a commercial representative of the New York Telephone Company. He stated that the toll slip showed a call to King from a party named Gordon made on July 28, 1958 (R. 398-401). Of course, the witness could not say of his own knowledge who placed the call. Any one telephoning King, whether from the Kimball office or petitioner's home, could have given the name of Gordon, and any cumulative proof on this point was no substitute for what the law required. Petitioner duly raised the point that King's testimony had not been connected, but the Court ruled against him (R. 463-465).

The general rule is that before a telephone conversation may be received in evidence, the declarant's voice must be identified, either on the basis of existing familiarity or retroactive recognition. See *United States* v. *Lo Bue* (D. C. N. Y., 1960), 180 F. Supp. 955; *United States* v. *Salsom* (C. A. 2, 1956), 231 F. 2d 887, cert. den. 351 U. S. 987; *Van Riper* v. *United States* (C. C. A. 2, 1926),

13 F. 2d 961, 968. The supposed circumstantial evidence herein does not measure up to the minimum requirements referred to in the reported cases.

QUESTION NO. 3

Whether the Court erred in permitting an opinion characterizing petitioner's place of employment as a boiler room.

The witness Kimball had not been on the stand two minutes before he was permitted to testify that "a boiler room is a firm that opens offices, sells different securities, hires high pressure salesmen, and uses the mails and tries to get customers for their salesmen and sell them by phone;" and then to state, over objection, that Kimball Securities (petitioner's employer) was a boiler room during 1958 (R. 46-47).

We may add an authoritative recent definition of a boiler room:

> "A room equipped with many telephones and used for high pressure selling of stock securities that are often without real value" Webster's New International Dictionary, 3d ed. (1961).

Thus at the very outset petitioner was prejudiced by this criminally disparaging description of the environment in which he was employed—when the true question was whether he himself had committed any fraud.

It must be borne in mind that petitioner worked for the Kimball firm only a matter of days and that one of the principals could not even identify him. Yet here he was being tried on a fraud charge, and on the very threshold the Court permitted his place of employment to be

described by the chief witness as a boiler room. A parallel situation would be presented if a salesman were charged with illegal possession of narcotics and his new employer were allowed to testify that the working quarters were an opium den; or if one accused of buying stolen merchandise had the man for whom he had just begun to work state the business to be that of a fence. There is a vast difference between denominating the office as a boiler room and proving that petitioner was aware of the aptness of the appellation. The error is emphasized by the fact that Kimball himself protested complete good faith during the period of appellant's employment; and by the further fact that petitioner had attempted unsuccessfully, by timely motion to obtain a severance so that the issue as to him might not be beclouded by proof of the activities of others who were strangers to him (see docket entries of March 31, 1961, and February 6, 1961).

Prejudicial matter of this sort should not be permitted to enter into any trial, for even a cautionary instruction notably absent herein could not eradicate the impression on the jurors' minds that one working in a boiler room was bound to be unscrupulous. See, *Helton* v. *United States* (C. A. 5, 1955), 221 F. 2d 338; *Scott* v. *United States* (C. A. 5, 1959), 263 F. 2d 398.

QUESTION NO. 4

Whether the Court erred in receiving, over objection, opinion testimony that salesmen probably used assumed names.

Improper on like grounds was the ruling permitting Kimball to testify, after stating he had never heard salesmen over the telephone had used names other than their

own, that this "does not mean that they could not have used other names" and he believed several did. An objection to the testimony was overruled (R. 61). Of course, the purpose in introducing this speculative and completely conjectural opinion was to create an atmosphere of fraud and to convey to the jury the notion of wrongdoing so commonly associated with the use of aliases. So long as there was no proof that either defendant on trial had attempted to disguise his identity, the "proof", such as it was, should have been excluded from the case.

QUESTION NO. 5

Whether the Court erred in receiving the admittedly incompetent but prejudicial testimony of the witness Gentzel, and in denying a motion to strike it.

The most effective Government witness on the subject of misrepresentation was one Perry H. Gentzel, an engineer residing at State College, Pennsylvania (R. 335-336). In November, 1958, he purchased shares in Mark, Inc., from the Kimball firm (note that this was four months after petitioner had severed all connection) in reliance on a number of telephone calls (R. 336-337). He was told "what a wonderful chance it was for an investment" and that he would get all his money back and still have the stock in a few months (R. 337). He would receive three or four calls a day in the effort to persuade him to buy more stock (R. 338). He made two purchases, totaling 5,100 shares, at $1.95 and $2.35 (R. 339-341, 345). He described other representations such as: the stock would be listed on the exchange (R. 342); that the caller had gotten into the venture through friends in Kansas, Oklahoma, Texas and Indiana (R. 343); that old oil wells were

being dug deeper and revived or revitalized (R. 343). He still had the shares and there was "no possible chance" to sell them (R. 346). The witness concluded by saying, "I have dealt with honest men all my life, and this is the first time I have ever met men who have done to me what they did", to which the Court sympathetically responded, "I know."

The foregoing recital might be viewed as most incriminating were it not for the basic testimony of Gentzel that all of his telephone conversations were had with one Norman Thomas (R. 337), not otherwise identified, except that the witness admitted having seen him (R. 344). Furthermore, the witness testified that he had never spoken either to petitioner or the codefendant on trial (Ross), but always Thomas (R. 346-347).

His testimony was promptly objected to on the ground that Thomas was not on trial (R. 338) and the Court deferred ruling on the theory that a connection might be shown.

The Government's expressed theory of introducing the proof was that the sales to Gentzel took place at a time when Ross was employed by Kimball Securities; that Thomas' statements were those of a "co-schemer" (R. 347); that similarity of acts showed a concert of action (R. 348).

At the beginning the Court appeared inclined to reject the proof, saying (R. 347-348), "You have to bring it clearly back individually to the defendants on trial in order to make it relevant"; that the testimony was not worth anything, since the fact that two salesmen operated in the same place did not mean they were equally guilty; that the defendants on trial could be convicted only on their own acts; that they were not to be held responsible

for similarity of representations (R. 348-349); and, finally (R. 351), "I don't think that Mr. Gentzel's testimony adds anything to the guilt or innocence of these two defendants on trial . . . No, I don't think it contributes anything whatever as to these two defendants on trial."

Even if this testimony had been stricken, as it surely should have been, the notion that the prejudicial effect could be merely eliminated would be the "unmitigated fiction" referred to by Mr. Justice Jackson in *Krulewitch v. United States* (1949), 336 U. S. 440, 453. What then are we to say to the ruling of the Court herein refusing to strike? Both defendants asked that it be stricken as highly prejudicial and on the ground that no connection had been proven, but the Court ruled that the question was for the jury (R. 550-551).

It is submitted that the jury should not have been allowed to consider Gentzel's impressive testimony of his dealings with the mysterious Thomas as having any bearing on appellant's guilt. The error is one which may not be ignored.

This point seems to have occasioned the Court of Appeals considerable difficulty. The principal ground for rejecting the argument was thus stated herein by Friendly, Cir. J.:

> "And since the utterances of Norman Thomas were offered as acts rather than as declarations, their admissibility against Gordon would not be destroyed by Gordon's previous withdrawal from the conspiracy."

Lutwak v. United States, 344 U. S. 604, 617.

The *Lutwak* case was decided by a closely divided Court, and we submit that its doctrine may not reasonably be enlarged to embrace hearsay testimony as to statements

even though they be viewed as acts—by some anonymous individual whose identity is not so much as suggested by the prosecution. At the very least the case at bar calls for a clarification of the *Latwak* holding, which has apparently been misunderstood and misapplied.

QUESTION NO. 6

Whether the Court erred in unnecessarily reproving, deriding and ridiculing petitioner's trial counsel.

It is impossible to peruse the record without gathering the distinct impression that the learned Court below was hostile to appellant and repeatedly manifested this attitude in the remarks to counsel.

In the course of perfectly proper cross-examination of the Government's first witness, which had been in progress for only a few minutes (R. 121), the Court charged petitioner's counsel with "just wasting a lot of time." When he asked to have an exhibit marked for identification—to show a standard practice—the Court curtly remarked (R. 121), "You have a client to represent and why don't you represent your client?" Exception was noted. Soon thereafter, without the slightest justification, the Court observed (R. 148-149), "I never heard such a distorted cross-examination," to which exception was also taken. Later the Court reiterated its impatience with cross-examination, saying, "This case is dragging out too long," and that counsel should keep his "eye on the ball" so as not to waste time (R. 170).

Perhaps as a concession to impartiality, the Court also reproved counsel for Ross, declaring (R. 204), "You are rambling and you do not seem to get your questions framed properly." See also R. 212, 235 ("I think this

cross-examination was completely unreasonable"); R. 575, 582, 623.

Later, when petitioner's counsel interrupted the prosecutor so as to prevent a reference to hearsay testimony, he was sharply reproved by the Court in this language (R. 321):

> "Mr. Frpling, if you had easy experience as a lawyer you would know that you don't stand up and interrupt that way. This is not the Municipal Court; this is the federal court, and I expect you to act like a lawyer does in this court."

In the midst of cross-examination of another witness, the Court accused counsel of asking unintelligible questions and "going all over the lot" (R. 396).

It happens that petitioner's trial counsel is also a certified public accountant. Nevertheless, when he was cross-examining as to the financial statements of Mark, Inc., the Court hinted that counsel did not know much about bookkeeping or accounting (R. 127). When apprised of counsel's views, the Court gratuitously remarked (R. 128), "I think they ought to change the C. P. A. examinations" that what counsel thought had nothing to do with it, and that this was "elementary bookkeeping" (R. 129).

Finally, petitioner's counsel politely noted on the record his exception to all the remarks made during the course of the trial as being prejudicial to his client (R. 459-461), to which the Court's reaction was that his "examination was not very sensible"; that counsel was too sensitive; and that the Court's statements had been made for his education.

Needless to say, the effect of the Court's position was necessarily harmful to petitioner. The jurors were bound

to infer that the Court regarded the individuals on trial as guilty; that there was no validity to the defense; and that time was being wasted by counsel. The trial judge "must take care not to give the jury an impression of partisanship on either side". *United States v. De Sisto* (C. A. 2, 1961), 289 F. 2d 833. See also *United States v. Brandt* (C. A. 2, 1952), 196 F. 2d 653).

The Court of Appeals noted in its opinion (footnote no. 3):

> "... Our reading of the cold record alone would not lead us to conclude that his conduct warranted the rebukes that were rather consistently administered to him."

In short, the Court recognized the validity of the point but declined to view it as rising to the level of reversible error. But in a prosecution wherein petitioners supposed guilt was predicated upon such flimsy proof, it was imperative that every substantial right be sedulously safeguarded, and it is impossible to conclude that this hostile attitude had no bearing upon the verdict.

CERTIFICATE OF COUNSEL

The undersigned certifies that the foregoing petition is presented in good faith and not for purposes of delay.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for certiorari should be granted.

New York, N. Y., August 28, 1963.

JACOB W. FRIEDMAN,
Attorney for Petitioners.

Opinion of United States Court of Appeals for the Second Circuit

FRIENDLY, *Circuit Judge*:

These appeals concern another episode in the fraudulent career of Kimball Securities, Inc., one phase of which has recently been recounted in *United States v. Aronson*, — F. 2d — (2 Cir. 1963). Indeed, the two trials sprang from the same indictment. It preamble to the charged, substantially in the language of § 17 of the Securities Act of 1933, 15 U. S. C. § 77q, that Kimball Securities, Inc., and numerous other persons, including Gordon and Ross, by the use of transportation and communication in interstate commerce and of the mails, employed a device, scheme and artifice to defraud, obtained money and property by untrue statements of material facts and omissions to state material facts necessary to make the statements not misleading, and engaged in transactions that operated as a fraud and deceit on purchasers of various securities, including common stock of Mark, Inc. The trial of Gordon on three substantive counts and a conspiracy count and of Ross on two substantive counts and the conspiracy count was severed from that of the Aronsons. At the close of the Government's case, the judge dismissed two substantive counts against Gordon, one against Ross, and the conspiracy count against both. The remaining counts, which were submitted to the jury, were Count 3, charging Gordon and others with use of the mails to send a confirmation of a purchase of Mark, Inc. stock to Hazel, Mae & Sam King, Jr., in Conway, Arkansas, and Count 10, charging Ross and others with use of the mails to send a confirmation of a purchase of Mark, Inc. stock to William S. Mugler in Amherst, Mass., both acts alleged to be in

furtherance of said scheme and artifice to defraud." Verdicts of guilty, judgments of conviction, sentencing and appeals followed.

Kimball Securities, Inc. was a typical "boiler-room" operation. Joseph Kimball, its president and guiding light, who had pleaded guilty, gave a vivid description of its sales methods. The process would begin by sending to persons on various occupational lists, "such as doctors, plumbers, anything you want," which Kimball owned or would purchase, "teaser letters" describing the bright financial future afforded by low-priced stocks. These were followed by sales literature touting some particular stock. Next would come a telephone call from a salesman called an "opener", who "would try and sell the prospect as much or as little as he could." This would be followed by more mail relating the "good news about the company," and then by the knock-out blow, a call from a "high-pressure salesman", colorfully characterized as a "loader", who would "try and increase the purchase of the stock."

One of the stocks to which Kimball turned its attention was that of Mark, Inc.; it arranged with one Cass, an officer of Mark, to sell this stock on a basis whereby the proceeds would be divided equally between Cass and Kimball. From July 21, 1958 to February 5, 1959, this was the only security—we rather hesitate to use that word—which Kimball sold; the price went from $1.50 to $2.35 per share; 258,000 shares were sold to 790 customers.

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[1] One of these was headed "How a $65 a Week Teacher Made $1,000,000 in the Stock Market." The secret of his success" was said to be "that he shunned investment grade issues in preference to speculative ventures in shares of little known companies."

Sam King, a plumber living in Conway, Ark., testified that during July, 1958, he received some literature from Kimball concerning Mark, Inc. About a week later he received a telephone call at his home, between 6 and 7 P.M. Central Standard Time, from a man who identified himself as Paul Gordon of Kimball Securities. A telephone company toll ticket established that on July 28, 1958, at 8:35 P.M. Eastern Daylight Saving Time (equivalent to 6:35 P. M. Central Standard Time), a call to King, lasting 20 minutes, was made from Gordon's home and charged to the Kimball number. King testified that the caller, who claimed he had been given King's name by a friend of King's, said that Kimball Securities had a block of shares in Mark, Inc. and he was getting some new customers, that Mark, Inc. "was an old reliable company and they were mining, and they were going to merge it with a helicopter firm, and the stock would double in probably thirty days, and that he would advise me when to sell and when to buy." King asked whether Kimball Securities was "anything like Merrill, Lynch, Pierce, Fenner & Beane." The caller, owning that "it was not as big an organization," said "it was just as reliable"; he also stated that if King didn't make any money, he couldn't either, and that he was staying late in his office to make calls to King and others. King bought 300 shares at $1.50 each. A man identifying himself as Gordon and having the same voice as the first caller telephoned later to urge further purchases. When King tried to sell the shares, he was informed by a Little Rock brokerage firm that no takers could be found at a price of 40 cents. Gordon did not testify.

Gordon's appeal raises no questions of identification worthy of discussion, since the toll ticket was ample evidence to support a finding that he was the man who tele-

phoned King. We shall discuss his claim of error in refusing to strike the testimony of the witness Gentzel when we come to Ross' appeal. His major contention is that there was insufficient evidence of violation of § 17 of the Securities Act because he was warranted in relying on the information about Mark, Inc. given him by his employer. We should have the greatest difficulty in accepting that argument on the facts here. Even though Gordon was employed at Kimball's for only seven working days, the five that had elapsed before his call to King should have sufficed to teach anyone, particularly a man like Gordon, who had previously worked for a respected securities firm, exactly what was going on; moreover, the "literature" on Mark prepared by Kimball was suspicious on its face to anyone with the slightest financial knowledge.[2]

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[2] The literature included an illustrated booklet whose cover contained a drawing of oil wells and oil tanks with the two words of the corporate title, "Mark, Inc." separated by a rocket; other "plates" were entitled "Imagination," "Brainstorming," "Experience," "Soundness," "Creative Thinking," "Vision," etc. Another sales item, "Kimball's Investment Notes," apologized for delay in the sending of "your 20 page, full color brochur" due to the "unprecedented demand"; it showed "Mark Annum Net Earnings" of $.50c per share for the year ended March 31, 1958, which were to be expanded to a potential of $1.08c.

Neither these exhibits nor still more important pieces of evidence, such as the telephone company toll ticket showing Gordon's call to King or the confirmation slips mentioned below, were included in "the original papers" transmitted by the clerk of the district court pursuant to F. R. Civ. Proc. 75 (o), here applicable by virtue of F. R. Crim. Proc. 39(b) and our Rule 11; nor were they reproduced in the appendices required by our Rule 15(b), or submitted in accordance with the alternative procedure authorized by our Rule 16(a). This failure to make pertinent exhibits available to us, save by special request to counsel on our part, is by no means unique to this appeal. We get the testimony because it has been lodged with the clerk of the district court who sends it along, but generally, especially in criminal appeals, we do not receive exhibits that often are far more probative, because counsel have simply kept them and make no effort to have them sent to

The evidence against Gordon was far more damning than what we have held sufficient in revocation proceedings, see *Berko* v. *SEC*, 316 F. 2d 137 (2 Cir. 1963). We are not here required to determine how far the principles set forth in that and other decisions apply also in criminal prosecutions. For the jury was warranted in finding, under the proper instructions it received, that Gordon knowingly lied when he made statements to King which were not based on information supplied by Kimball, such as that he had gotten King's name from a friend, that Kimball Securities was "just as reliable" as Merrill Lynch, that he would make no money unless King did, and that he was staying late in the office to make the call. It would have been justified also in finding that when Gordon stated his expectation that the stock would double in price in thirty days, he was voicing a belief that did not exist, (unless it was based on the expected results of Kimball's high pressure sales campaign, in which event he was omitting "to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading"), and that when he agreed to advise King when to sell, he was making a statement he had no intention of carrying out. All these alleged misrepresentations were plainly frauds within statutes antedating § 17(a)(2), see *Bentel* v. *United States*, 13 F. 2d 327, 329 (2 Cir.), cert.

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us. For a variety of reasons, it would seem desirable that exhibits of modest size pertinent to an impending appeal be lodged with the clerk of the district court so that he can forward them along with the transcript; the announced purpose of the reform embodied in F. R. Civ. Proc. 75(o) was to give "the appellate court the advantage of having before it the original papers just as they were presented to the trial court." Committee Note of 1946. Whether this has been done or not, exhibits which counsel desire us to consider are subject to our Rule 15(b) relating to appendices or to the alternative permitted by Rule 10(a).

denied *sub nom. Amos v. United States*, 273 U. S. 713; (1926); *Van Riper v. United States*, 13 F. 2d 961, 964-65 (2 Cir.), cert. denied *sub nom. Jackson v. United States*, 273 U. S. 702 (1926); and within that section also, 3 Loss, Securities Regulation (2d ed. 1961) 1430-39, and authorities cited.[3]

Ross was in Kimball's employ for the last two weeks of November, 1958. The count against him that was submitted to the jury related to a call allegedly made to William S. Mueller, a research professor at the University of Massachusetts, which resulted in the sale of 100 shares of Mark, Inc. at $2.35 per share on November 26. The caller, identifying himself as Ross, told Mueller, who had previously received the "investment news letter" about Mark, that Mark "was a very sound investment, that he was quite certain that the stock would at least double in approximately six months, and that it might go as high as 10 to $14 a share within six months," and also that Kimball Securities "was a very reliable company, that they had hired stock analysts who were analyzing the various stocks so as to protect their cu-

[3] Gordon complains also of slighting references to his trial counsel by the judge; the Government claims these were merited. While Gordon's trial counsel may not have exhibited all the forensic skills that might be desired, our reading of the cold record alone would not lead us to conclude that his conduct warranted the rebukes that were rather consistently administered to him. Although we realize how discouraging it must be for an experienced trial judge to see valuable time being lost or to hear questions that are improperly framed, it would be better to address any necessary admonitions to counsel outside the hearing of the jury. However, we cannot believe that the remarks complained of were sufficiently prejudicial to call for reversal in view of the strength of the Government's case against Gordon and of the fact that, unlike *United States v. Brandt*, 196 F. 2d 653 (2 Cir. 1952), and *United States v. De Sisto*, 289 F. 2d 883 (2 Cir. 1961), which Gordon cites, the judge's comments here did not reflect on the defendant's case, so much as on the way it was being handled.

tomers." Ross testified that he could not remember whether or not he had called Mueller, that he had studied Kimball's literature about Mark for almost a day and thought it was "a good security" and "should be selling at a higher price" if all the reports were true, and that he left Kimball principally because he found someone else at his desk and the prospect cards assigned to him strewn about. Postponing questions as to the application of the hearsay and best evidence rules in connection with the identification of Ross as Mueller's caller, we shall first deal with other points raised on his appeal.

Over consistent objection by defense counsel, the prosecutor subjected Ross to extensive cross-examination on his career as a stock salesman. He brought out that Ross was first employed in 1955, for two to three weeks, by Brown, Barton & Engel in Newark, which sold only one stock, Randex Uranium, Ross' sales being made by telephoning names supplied by the office; he was allowed to ask whether Ross told customers that Randex was a good speculation and that Ross believed the price would go up—questions that Ross answered in the affirmative although he knew "nothing about the operations at all" and whether Randex or Brown, Barton & Engel were still in business, as to which Ross disclaimed knowledge. Further questioning took Ross to Golden, Dersth in New York, where, for five weeks, he sold "a few securities", also over the telephone, including American States Oil and "South something, a racing stock, but I can't recall the name of it"; to M. T. Schneck, where, for a few weeks, he sold Great Sweetgrass over the phone; to G. F. Rothschild, where for six months he made telephone sales of Great Sweetgrass, Kroy Oil, and United Pyc & Chemical; and to other firms, including Muck Robbins, Philip Newman & Associates, and Steven Randall, selling stocks

over the telephone. He left several of these houses because they were being investigated by the SEC. He did not remember what stock he had sold at Steven Randall, giving negative answers when asked whether it could have been Swan Finch or Doeskin Products; when asked whether it could have been Havana Racing, he thought "there was a Havana Racing now that I recollect, and then I recollect another company, I believe it was American Dryer." He admitted regularly telling his prospective customers that the stock he was selling was a "good speculation" and would go up in price—his reliance for this being on sales literature; questions as to whether the employer and the company were still in business elicited varying responses.

Ross claims it was error to allow this cross-examination since it "insinuated prior misconduct." Of course it did, but, as the mere statement shows, the evidence was highly relevant. Evidence of "other crimes" is admissible "to show, by similar acts or incidents, that the act on trial was not inadvertent, accidental, unintentional or without guilty knowledge." McCormick, Evidence (1954), at 329. "The prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent." 2 Wigmore, Evidence (3d ed. 1940), at 200. Furthermore, "when the crime charged involves the element of knowledge, intent, or the like, the state will often be permitted to show other crimes in rebuttal, after the issue has been sharpened by the defendant's giving evidence of accident or mistake, more readily than it would as part of its case in chief at a time when the court may be in doubt that any real dispute will appear on the issue." McCormick, *supra*, at 331. Here Ross had sought in his direct testimony to depict himself as an unwitting tool in Kim

ball's iniquitous venture; it was wholly proper for the Government to rebut this claim of ignorance and innocence by showing that Ross had long drifted among houses selling similarly worthless stocks by similar methods. The case is so totally different from *United States v. Provoo*, 215 F. 2d 531, 534-37 (2 Cir. 1954) and others cited by Ross that discussion of them would be superfluous.[1]

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[1] Much ink has been spilled in the briefs and appendices over an episode in Ross' cross-examination where the transcript shows the following at the close of the examination in regard to his activity at Steven Randall:

> "Q. Is American Dryer still in business? A. I believe they are but I am not sure.
>
> Q. I won't ask you about Swan-Finch now.
>
> Mr. Berman: I don't understand that comment, your Honor.
>
> The Court: Evidently you have not read the newspapers.
>
> Mr. Berman: No, I have not.
>
> The Court: Perhaps it is just as well then.
>
> Mr. Berman: All right, your Honor, excuse me."

After Ross had filed his brief in this Court alleging particular prejudice because of this mention of Swan-Finch, the Government moved in the District Court, under F. R. Civ. Proc. 75(h) and F. R. Crim. Proc. 39(b)(1), to correct the record to substitute "Havana Racing" for "Swan-Finch." After considering the reporter's affidavit that he was certain the reference was not to Swan-Finch, although he didn't know how those words got transcribed; defense counsel's affidavit that in his recollection "Mr. Morrison [the prosecutor] mentioned Swan Finch" and that Morrison had told him he wasn't sure which name he had mentioned and that the reporter wasn't sure either; and Morrison's affidavits that in his recollection he said "Havana Racing" that he never told defense counsel he wasn't sure what he said but rather that he was sure he said "Havana Racing," and that he never told defense counsel he had discussed the matter with the court reporter, Judge Dawson granted the Government's motion, stating that he had "a distinct recollection that the reference was not to Swan-Finch but to Havana Racing" and calling attention to the occurrence of the episode on October 31, 1962, a date during the Cuban crisis when "anybody acquainted with the newspapers would know that

Perry H. Gentzel, an engineer residing at State College, Pa., was a victim of Kimball's promotion of Mark on a larger scale than King or Mueller. He testified that in the latter part of November, 1958 (four months after Gordon had left Kimball's but during Ross' employment there), he received a number of calls from a Kimball salesman who identified himself as Norman Thomas, and made the usual optimistic comments about Mark, Inc., including a statement that it would be listed on the stock exchange. These led to purchases totalling 9,100 shares, some at $1.95 and others at $2.35 per share. Gentzel admitted that he had never talked to anyone who identified himself as Ross, and the Government did not seek to rest admissibility on the theory that "Norman Thomas" was a fictitious name used by Ross, although a telephone company witness testified to a call made from the Kimball office to Gentzel on November 25 by a party giving the name of Ross and there was evidence that Kimball had never employed a "Norman Thomas". The theory of admissibility seems rather to have been that the indictment charged a scheme and artifice to defraud, and that Gentzel's testimony tended to show the existence of a scheme on the part of Kimball Securities and its salesmen. At the conclusion of Gentzel's testimony the judge said in the jury's presence that he didn't think that "it adds very much as to these two defendants. It does add to the general effect, but the general effect has been well established by Mr. Kimball [illegible]" However, on the

Havana Racing was not a going concern." We fully accept Judge Dawson's recollection, which in addition to all else, fits the context of the questioning better than the transcript as written. But if the case were otherwise, we would still fail to perceive how mere repetition of a reference to Swan Finch, which had elicited no objection when first made and provoked no request for a ruling by the judge on the alleged repetition, see *United States* v. [illegible], 310 F. 2d 817, 819 (2 Cir. 1962), could constitute a sufficient ground for reversal

next morning, after his dismissal of the conspiracy count, he denied a motion to strike Gentzel's testimony.

A charge of a "device, scheme, or artifice to defraud" does not require proof of participation by more than one person. *Pereira* v. *United States*, 347 U. S. 1, 11 (1954). On the other hand, a "scheme" involves some connotation of planning and pattern, and it is hard to doubt that evidence showing that the conduct charged to a defendant followed a pattern of fraud similar to one that was being contemporaneously practiced by a fellow employee, or even that was followed later by another employee of the same house with respect to the same stock, has enough logical bearing to pass the test of relevancy. Despite the dismissal of the conspiracy count, the evidence would seem to have been admissible as the act of a co-conspirator if the judge had determined, as he properly might have, that "evidence, other than that whose admissibility is under challenge, disclosed" a conspiracy. *United States* v. *Annunziato*, 293 F. 2d 373, 378 (2 Cir.) cert. denied, 368 U. S. 919 (1961), and cases cited; *Reistroffer* v. *United States*, 258 F. 2d 379, 387 (8 Cir. 1958), cert. denied, 358 U. S. 927 (1959). The amount of proof *aliunde* as to the existence of a conspiracy that is required to render such evidence admissible is not as high as the amount needed to warrant submission of a conspiracy charge to the jury. See *United States* v. *Nardone*, 127 F. 2d 521, 523 (2 Cir.), cert. denied, 316 U. S. 698 (1942). And since the utterances of "Norman Thomas" were offered as acts rather than as declarations, their admissibility against Gordon would not be destroyed by Gordon's previous withdrawal from the conspiracy. *Lutwak* v. *United States*, 344 U. S. 604, 617 (1953). It is true that the judge did not rest his ruling on this theory; after saying that "It takes more than that [the Government's evidence] to prove a conspiracy," he ruled simply that

"Gentzel's testimony to the extent it is relevant will remain in the record." Still we should hardly be warranted in reversing for the admission of evidence simply because the judge did not place his ruling on the ground that would most readily have supported it. Moreover, we see no reason why the admissibility of relevant "acts," as distinguished from declarations of an associate need rest on the existence of a conspiracy, since no hearsay problem is involved. See *Roe v. United States*, 316 F. 2d 617, 622-25 (5 Cir. 1963). Finally, even if we should be wrong in all of this, admission of the evidence was not so prejudicial as to call for reversal. In the presence of the jury, the judge had made not only the statement quoted above but a number of other remarks as to the lack of force in Gentzel's testimony as against Gordon and Ross; he would doubtless have included a limiting instruction on this subject in his charge if requested to do so.

This brings us to the serious issues raised in Ross' appeal. The fact that the man who phoned Mueller identified himself as Ross was not sufficient to permit the jury to infer that Ross was the caller. 7 Wigmore, Evidence, *supra*, at 617. The Government sought to supply the needed additional evidence in several ways. Walter Gairing, who lived in Wadsworth, Ohio, testified that on or about November 19, 1958, he had received a call in the early evening concerning Mark, Inc. from a Kimball salesman who identified himself as Ross; telephone company records showed a call to Gairing's number from Kimball Securities by a person named Ross at a corresponding hour on November 18. Both Mueller and Gairing identified confirmation slips in which there was typed in a blank after the word "Salesman" the number "24". Then Kelly, an investigator for the SEC, testified that in January, 1959, he visited the Kimball office and asked the cashier, Sussman, to identify the numbers that the

salesmen used; that Sussman "pointed to a list that was on the side of the cage, the cashier's cage, and it showed the numbers and the salesman who was assigned to that particular number on the list"; and that number 24 was assigned to Ross. This evidence, along with the inference from Ross' failure to deny that he called Mueller and Gairing or that his number was 24, was clearly sufficient, *N. Sims Organ & Co.* v. *S. E. C.*, 293 F. 2d 78, 80-81 (2 Cir. 1961), cert. denied, 368 U. S. 968 (1962), if Kelly's testimony was admissible.

Ross contends that admission of the testimony violated both the hearsay rule and the best evidence rule. It is plain enough that Kelly's testimony about Sussman's pointing to the list was not outside the hearsay rule merely because Sussman used no words; the pointing was as much a communication as a statement that "This is a list of the names and numbers of the salesmen" would have been. See Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 190-92 (1948). But Ross' trial counsel, although he had objected on the ground of hearsay when Kelly was first interrogated concerning his request that Sussman identify the numbers the salesmen used, did not repeat the hearsay objection when Kelly testified to the pointing. We would not wish to rely on what may seem so technical a point were it not that the objection itself is so technical and that the failure to repeat the hearsay objection, when coupled with the vigorous objection on other grounds, may well have distracted the judge's attention from the hearsay problem; if objection had been properly raised, this problem very likely could have been met by recalling Sussman. In any event, Kelly's testimony about the list itself, the character of which was indeed not disputed, would seem sufficient non-hearsay evidence to es-

tablish the meaning of that document—if such testimony was not barred by the best evidence rule; any hearsay error would therefore not be prejudicial.

Counsel did object "On the ground that the list is the best evidence, and it will speak for itself, and the proper foundation has not been laid to indicate whether the list was valid or a legitimate list, whether the list was in fact a part of the broker's business or the business of the salesmen." The judge thereupon asked Kelly, "Have you got that list or was it left there?" Kelly answered, "It was left there, but I took down information including the names and the numbers," after which the judge said "I think that is sufficient to lay the foundation" and permitted Kelly to testify as to salesmen's numbers on the list, including Ross'.

This evidence, offered to prove the contents of a writing, was within the best evidence rule, 4 Wigmore, *supra*, §§ 1178, 1183, and the reasons for it, *Id.* § 1179. Production of the list was therefore required unless it was not feasible. *Id.* § 1192. The proper procedure was for the Government to seek to establish from Kelly, Sussman, or Kimball that the list no longer existed in the fall of 1962 when the case was tried; we cannot understand why this was not done. But there had been testimony that the Kimball firm had gone out of business in February, 1959, and the judge was evidently convinced that a paper of so little permanent value as the list in the cashier's cage would not be available more than three and a half years later. Much less of a search is required to permit the use of secondary evidence when "the subject of inquiry [is] a useless paper, which may reasonably be supposed to be lost." *Brewster v. Sewall*, 3 B. & Ald. 296, 299, 106 Eng. Rep. 672, 673 (1820). Moreover, great deference is accorded to the trial judge's determination of this issue of

feasibility. McCormick, *supra*, at 414; *Galbreath v. United States*, 257 Fed. 648, 658 (6 Cir. 1918); indeed, Wigmore urges that the issue "should be left entirely to the *trial Court's discretion.*" Vol. 4 at 340. It can be argued that these authorities relate only to cases where there was some evidence of a search whereas here there was none. But we would think it an undue formalism to reverse Ross' conviction because of a possible violation of this merely preferential rule of evidence under the circumstances here presented—where the probabilities that the paper no longer existed are, in fact, so strong, the "writing" being proved was so simple, there was no ground for suspecting the accuracy or good faith of Kelly's observation, and Ross, who testified on his own behalf, did not even question that 24 was his number.

Affirmed.